

**Aperitivo Restaurant, Inc. d/b/a Aperitivo and Local 100, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Case 2-CA-32774**

November 30, 2000

**DECISION AND ORDER**

**BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND HURTGEN**

Upon a charge filed by the Union on February 8, 2000, and amended charges filed by the Union on May 2 and July 5, 2000, the General Counsel of the National Labor Relations Board issued a complaint on July 27, 2000, against Aperitivo Restaurant, Inc. d/b/a Aperitivo, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondent failed to file an answer.

On October 30, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On October 31, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated September 20, 2000, notified the Respondent that unless an answer were received by September 29, 2000, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, with a principal place of business located at 321 West 44th Street, New York, New York, has been engaged in the operation of a restaurant. Annually, in the course and conduct of its

business operations described above, the Respondent derives gross revenues in excess of \$500,000, and purchases and receives at its restaurant goods and services valued in excess of \$5000, which originate from points located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all material times, Luciano Diminich has held the position of the Respondent's owner and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent acting on its behalf.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

*Included:* All full time and regular part-time dining room, kitchen and bar employees.

*Excluded:* All other employees, including office clerical employees, guards, professional employees and supervisors as defined in the Act.

Since in or around 1990, the Union and the Respondent have been parties to a series of collective-bargaining agreements, the most recent of which was effective by its terms from September 1, 1996, through August 31, 1999.

At all material times, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the unit set forth above for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

In or around October 1999, the exact date being currently unknown to the General Counsel, the Respondent closed its restaurant, resulting in the permanent layoff of all of the employees in the unit described above. On or November 12, 1999, the Union, by letter to the Respondent, requested to bargain with the Respondent regarding the effects of the closing of the restaurant. Since on or about November 12, 1999, the Respondent has failed and refused to respond to the Union's request to bargain.

The Respondent closed its restaurant and permanently laid off all its unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct on the wages, hours, and working conditions of the unit employees.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to bargain with the Union concerning the effects on the unit employees of the closing of the Respondent's restaurant, we shall order the Respondent, on request, to bargain with the Union concerning the effects of the decision to close. In addition, we shall accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses they may have suffered as a result of the failure to bargain about such effects and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).<sup>1</sup> Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Aperitivo Restaurant, Inc. d/b/a Aperitivo, New York, New York, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Local 100, Hotel Employees and Restaurant Employees International Union, AFL-CIO as the exclusive representative of the employees in the bargaining unit set forth

<sup>1</sup> See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). In *Transmarine*, the Board ordered an employer that had unlawfully refused to bargain over the effects of its plant closure decision to, inter alia, pay unit employees at their normal rate of pay beginning 5 days after the Board's decision until the first of four events: (1) an effects bargaining agreement was reached; (2) a bona fide bargaining impasse was reached; (3) the union failed to timely request or commence bargaining; or (4) the union failed to bargain in good faith. *Id.* The Board further specified that "in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ." *Id.*

below by refusing to bargain with the Union concerning the effects on the unit employees of the Respondent's closing of its restaurant at 321 West 44th Street, New York, New York, and the termination of the unit employees.

*Included:* All full time and regular part-time dining room, kitchen and bar employees.

*Excluded:* All other employees, including office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the effects on the unit employees of the closing of the Respondent's restaurant at 321 West 44th Street, New York, New York, and the resulting termination of the unit employees.

(b) Pay the former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its restaurant at 321 West 44th Street, New York, New York, and its termination of the unit employees; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;<sup>2</sup> or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in or about October 1999, when the Respondent closed its restaurant, to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy portion of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and

<sup>2</sup> *Melody Toyota*, 325 NLRB 846 (1998).

copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"<sup>3</sup> to all former employees who were employed by the Respondent when the restaurant was closed in or about October 1999.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

#### NOTICE TO EMPLOYEES MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail and abide by this notice.

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to bargain in good faith with Local 100, Hotel Employees and Restaurant Employees International Union, AFL-CIO as the exclusive representative of the employees in the bargaining unit set forth below by refusing to bargain with the Union concerning the effects on the unit employees of our closing of our restaurant at 321 West 44th Street, New York, New York, and the resulting termination of the unit employees.

*Included:* All full time and regular part-time dining room, kitchen and bar employees.

*Excluded:* All other employees, including office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the effects on the unit employees of the closing of our restaurant at 321 West 44th Street, New York, New York, and the resulting termination of the unit employees.

WE WILL pay limited backpay to the unit employees in connection with our failure to bargain with the Union over the effects of our closing of the restaurant.

APERITIVO RESTAURANT, INC. d/b/a APERITIVO